No. 88-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOEING COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari to The United States Court of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

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LIST OF PARTIES

Petitioners and appellees in the court of appeals are The Boeing Company, Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley, and Herbert A. Reynolds. The United States is the respondent and was the appellant in the court of appeals.

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PETITIONER'S REPLY BRIEF

Argument

Petitioner The Boeing Company disputes much of what Respondent, the United States of America, asserts in its Brief in Opposition to Petitions For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ("Opposition"). This Reply, however, addresses only the more significant factual and legal issues raised by the Opposition.

1. The most troubling aspect of the Opposition is the government's factual presentation. Many of the factual representations are either directly refuted by

the record or not contained in the record at all. For example, the government asserts on page 3 of its Opposition that Boeing's severance payments "were neither rewards based on the recipients' past services to Boeing nor hardship payments. . . [but] were made only because the individual petitioners were to assume positions with the Department of Defense. . ." This assertion is contradicted by the district court's findings and by the record below.

The district court found that Boeing made the severance payments "to sever the relationship with these employees based on past performance and accumulated benefits." Boeing Petition, App. B, 26a. This finding is supported by facts of record. As T.A. Wilson, then Chairman of the Board at Boeing, stated in his affidavit, "My decision [to grant a severance payment] was based on my own judgment, considering the past Company service of the departing employee and my personal sense of the financial settlement appropriate to sever all company ties absolutely and encourage acceptance of the government position." Joint Appendix ("J.A.") 442. *See also* J.A. 685 ("what we try to do [in making a severance payment] is to recognize what the person has done for us, what he has earned in the way of benefits. . .") (Testimony of Stanley M. Little, Vice President of Industrial Relations); J.A. 1057 (Testimony of Melvyn Paisley); J.A. 1079 (Declaration of Harold Kitson); J.A. 954-955 (Testimony of Lawrence Crandon). The Opposition impugns this evidence as self-serving (Opposition at 23-24), but it is competent evidence received, weighed and relied upon by the trier of fact at trial. The factual issues are critical in determining whether the

court of appeals exceeded its powers of review under Federal Rule of Civil Procedure 52(a).

2. The government further asserts that "in every case [where Boeing made a severance payment], the recipient left Boeing to accept a high-level position with the United States Government . . . typically involving research and development or long-range defense planning . . . . No such payments were offered to Boeing employees who retired, left Boeing for other nonfederal employment, or accepted lower-level government positions or positions at agencies other than those of special interest to Boeing." Opposition at 3, 4 & n.3.

The record does not support the government's assertion. Indeed, petitioner Crandon, who received a severance payment of $40,000, accepted a computer programming position with NATO in Brussels, Belgium, at the GS-15 level. This position is hardly "high-level" nor does it involve "research and development" or "long-range defense planning." The same is true of other past recipients of severance payments. J.A. 61-63.

Moreover, contrary to the government's assertion, several former Boeing employees who did *not* receive severance payments left the Company to accept high-level government positions at agencies that, by the government's description, are of "special interest" to Boeing. For example, Boeing did not make severance payments to J.R. Kubat, who left the Company to become the Apollo Program Control Manager for NASA, Jerry L. Calhoun, who became Deputy Assistant Secretary of Defense, David Chang, who became Deputy Assistant Secretary for Science and Technology at the Department of Commerce, or to

Paul Hauler, who became Director of Industry Affairs at NASA. J.A. 64-65. The fact that certain employees did not receive a severance payment had nothing to do with the government position assumed. Rather, it was a case-by-case determination based on a number of factors including past work history. The government's implications are starkly inconsistent with these facts.

3. The government also asserts that the district court's finding that the severance payments were not contingent upon government service is contradicted by the "objective evidence of record." Opposition at 22. The district court found that:

> [T]he severance payments made to the individual defendants were not contingent upon the individuals entering into government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at anytime in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future.

Boeing Petition, App. B, 19 at ¶ 17. This finding was undisturbed by the court of appeals and, contrary to the government's assertion, is entirely consistent with the record below. As T.A. Wilson testified, "if then [the departing employee] doesn't get the government job and he goes to work for a competitor, we wouldn't get the money back, wouldn't expect to." J.A. 652; J.A. 443 ("severance payments. . .were in no way con-

tingent upon the length or quality of the departing employees' government service or the likelihood that the departing employees would ultimately return to the Company. Once the employee separated from the Company, the severance payment was his no matter what he did in the future. . .") Similarly, three other Boeing managers testified that the payments were not contingent upon any event other than the individual's departure from the Company. J.A. 585-86, 636, 732. Moreover, the individual petitioners understood that the only contingency attached to the severance payment was their separation from the Company. J.A. 935, 962, 1035, 1044, 1061. While it is true that Boeing's practice was aimed at encouraging public service, the payments were not contingent and there was no *quid pro quo*. Even assuming the "other evidence" relied upon by the court of appeals (Boeing Petition, App. A, 8a) creates a factual dispute, an appellate court cannot properly reverse a district court's fact findings when they are supported by credible evidence, as is the case here.

4. The government relies heavily on the opinions of the Office of Legal Counsel to support its contention that Boeing's severance payments violated § 209 because of the method used to calculate the payments. Opposition at 11-13.[1] This reliance reflects a confusion between legal opinions responding to requests concerning a future course of conduct and proof at trial

[1] There are no judicial constructions of the legality of severance payments under 18 U.S.C. § 209. The government argues that statutory construction depends on one Roswell Perkins' report for the Bar of the City of New York prepared two years before the statute was enacted and his subsequently published law review article. Opposition at 11, 12, 14-17.

of allegations that Boeing's course of conduct violated a standard of conduct under a criminal statute. In any event, the OLC opinions make it clear that a determination of whether a payment violates § 209 depends on the "subjective intent of the parties" not, as the government would now have it, solely upon "objective" factors used to calculate the payments. Op. OLC at 1 (Sept. 15, 1977); Op. OLC at 5 (May 10, 1976) ("issue turns upon the intent of the parties").

Moreover, because the legality of a particular payment necessarily depends on subjective intent—which is, by definition, not determinable from the nature of information supplied to the OLC—the OLC opinions are both fact specific and qualified in nature. As one Assistant Attorney General, often cited in the Opposition, noted:

> [The legality of a payment under Section 209] cannot be resolved conclusively on the basis of documents alone, but would require actual investigation of all surrounding facts and circumstances bearing on intent. Such an undertaking is simply not feasible in the context of the ordinary advice-giving function of this office.

Op. OLC at 7 (May 10, 1976). Thus, contrary to the views of both the government and the court of appeals, the factors used by the OLC in its advisory opinions are not conclusive yardsticks from which the finder of fact must divine subjective intent.[2]

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[2] The government and the court of appeals also overlooked the fact that the objective factors used by Boeing to calculate

5. Finally, with respect to the issue of injury, the government misses the point raised in Boeing's petition that the court of appeals erred in presuming injury from the mere fact of a severance payment. Because the government's case against Boeing is premised on a claimed common law tort[3] of inducing the breach of a fiduciary duty, it is indisputable that the government cannot recover unless it can establish that it was in fact injured by the payments. Boeing Petition at 15-17. The district court found that none of the severance payments at issue created an actual conflict of interest because "[n]one of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government employee." Boeing Petition, App. B, 27a. This finding, as well as the finding that "the individuals capably and honorably performed their public duties without bias and with independence and impartiality," *id.* at 21a, ¶ 23, were not disturbed by the court of appeals and were either stipulated to or not contested by the

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the severance payments reflected the individual petitioners' past services and performance. As the district court observed, "salary figures and benefits are an accurate measure of past contributions to the Company . . .[because] [s]alaries are paid on the basis of the length of service and level of performance." Boeing Petition, App. B, 26a.

[3] Surprisingly, the Opposition asserts that "the common law rule is inapplicable here, because this suit is based on a statute . . . ." Opposition at 18. The Complaint pleads common law claims (¶¶ 1, 16, 17, 20, 22, 25, 27, 30, 32, 35, 37 and 40), and government attorneys asserted at trial that the federal common law controlled the suit. J.A. 1001, 1002, 1004, 1103, 1104.

government.[4] Thus, the court of appeals erroneously presumed injury when none in fact existed.

The government never addresses the issue of injury, but focuses entirely on the measure of damages for a tort based on § 209. The fact of injury, however, is a separate inquiry from how an injury should be compensated. Moreover, even in its discussion of the measure of damages, the government limits its analysis to an argument for disgorgement of payments received which can have no pertinence to Boeing. Opposition at 16-18. Requiring Boeing to pay damages in the amount of the severance payments is wholly improper because, unlike the defendant who made the bribe in *Continental Management, Inc. v. United*

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[4] The government claims it did not stipulate that no actual conflict of interest occurred and that it refused to sign a stipulation that "it would not contest the 'fact' that the individual petitioners did not provide any preferential treatment to Boeing." Opposition at 18 n.11. At trial, however, the government indeed agreed that it did not "dispute" the quality of the individual petitioners' performance of their government positions and that it did not "contest the fact" that Boeing did not receive preferential treatment as a result of the severance payments. J.A. 339, 1007, 1012.

Moreover, the government *stipulated* that "No officer or employee of the Department or Defense (including the Department of the Navy) has concluded that, as a result of any defendant's receipt of a severance payment from Boeing, that defendant engaged in a 'conflict of interest situation' or committed a 'breach of the fudiciary duty of individual loyalty' owed to the United States during government employment." J.A. 339, 1012. The government also *stipulated* that each of the individuals' superiors "were and are fully satisfied that [the individual] capably, faithfully and honorably performed his public duties without bias and with independence and impartiality". J.A. 333-339, ¶¶ 33, 50, 65, 84, 101; J.A. 1012.

States, 527 F.2d 613, 618 (Ct. Cl. 1975), Boeing received no *quid pro quo*, preferential treatment, or other benefit as a result of the severance payments.

Conclusion

The writ should be granted or alternatively the Court should summarily reverse the court of appeals judgment as inconsistent with Rule 52(a).

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